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In The

Supreme Court of the United States

CHARLES ALFORD,

Petitioner,

v.

CUYLER LARUE WINDHAM, JR., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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In their Brief in Opposition, Respondents incorrectly argue that Petitioner is asking this Court to overturn the *Graham v. Connor*, 490 U.S. 386 (1989), decision. (Brief in Opposition, p.16) On the contrary, Petitioner is requesting this Court to embrace the *Graham* decision and keep the Fourth Circuit from eroding away the protections provided by the holding in *Graham*. The Fourth Circuit has set a dangerous precedent by holding that an officer's reason for his use of force (i.e. why he pulled the trigger) is irrelevant and can be ignored in deciding the reasonableness of his actions.

I. The Fourth Circuit Erroneously Held that the *Graham* Decision Prohibits an Inquiry into the Shooter's Reason for Using Force

At oral argument, Judge Legg, who wrote the majority opinion for the Fourth Circuit in the present case, described his understanding of the reasonableness test outlined in *Graham* as follows:

> Qualified immunity is not the easiest concept in the world. So I was thinking about how does what Officer Windham was thinking at the time that he shot the plaintiff . . . and am I correct in assuming that you completely disregard what he said he was thinking and you place a reasonable officer in the position of Windham with all the physical things that were happening? And that in looking at the record most carefully or in the favor of Mr.

> Alford which would mean that nobody climbing on his back, you don't care about what he was thinking. You have a very confused situation. And from what I get from the record Mr. Alford moves towards whoever shot him with his hands reaching out and then he takes a blow and then he gets shot. So am I correct in saying that you don't look at the subjective thoughts of Windham? (Oral Arguments on May 22, 2007)

According to Judge Legg, the reason that Windham pulled the trigger has nothing to do with the analysis into the reasonableness of Windham's actions. "We take officer Windham sort of like you think of a movie scene with all these people. We take him out of the scene. We put him on the sideline." (Oral Arguments on May 22, 2007)

This is not the test that was intended by the *Graham* court. While the *Graham* decision did not explicitly deal with the relevance of the officer's explanation of the shooting to the reasonableness inquiry, it is implicit within the rationale behind the objective reasonableness test that the Court should examine whether the officer's explanation of the basis for the shooting is reasonable. Without such an inquiry, an officer would be allowed to escape liability based on something he never saw, thought or believed to be true. Under the holding in *Graham*, the Fourth Circuit should have looked at the reason that Windham pulled the trigger and determined if that explanation is objectively reasonable under the facts and circumstances of the case in addition to whether an

objectively reasonable officer would have used force under similar circumstances.

II. The Officer's Explanation for the Use of Force Can Be Easily Determined by His Own Testimony

Respondents argue that such a test would "cause courts at every level of the federal and state systems to second-guess law enforcement officers and to become, in effect, mind readers or diviners." (Brief in Opposition, p.26) But the officer himself would provide the explanation. At the officer's deposition, the plaintiff's lawyer would ask the officer, "Why did you shoot my client?" The officer would then testify as to why he pulled the trigger. That would be the explanation. There is no mind reading involved. It is just that simple.

Respondents argue that it would take "mind-reading, psychology, divination, and second-guessing" to figure out why the officer pulled the trigger and that the present case shows how a claimant can twist the facts to reach a certain result. According to Respondents, "Petitioner either misstates or twists the record to try to create an impression that Captain Windham's subjective intent was other than it was." (Brief in Opposition, p.21) But Windham's own testimony as to why he shot Charles Alford is unequivocal and is the sole basis for the explanation.

In the present case, Windham testified that Charles Alford was not running towards him.

Q: As he came towards you, do you recall whether he was walking, running or what his speed was?

A: No.

Q: Did it appear to you that he was running towards you?

A: No, it did appear for him to be running.

(Deposition of Cuyler Larue Windham, Jr. p.123 lns. 9 through 17)

As Windham approached Charles Alford, he felt someone jump onto his back.

Q: Okay, let me walk through that; all right, as you are approaching the large black male, you suddenly feel somebody – well, you suddenly feel a weight on your back, correct?

A: Yes.

Q: And in your mind, it – you feel like someone has, for a better term, jumped on your back –

A: Yes.

(Windham Depo. p.126 lns. 6 through 13)

Windham then reached around with his left hand onto the right side of Charles Alford's neck to try and push Alford to the ground.

Q: All right, and then when you felt the weight on your back, the first thing you

did was attempt to take with your left hand – assist the large black male to the ground, correct?

A: Yes.

Q: And tell me how it was that you would have done that? Would it have been the same as the large black female?

A: Except – except the opposite side; he was coming up to me basically how we're sitting, so I would have attempted to fend from his right side.

Q: In – in doing the large black female, you made it sound like you would have put your hand over her left shoulder and then on to the back of her neck and – and gone that way. With the large black male, would it have been over the right shoulder and hooking down?

A: Yes.

(Windham Depo. p.126 ln. 21 through p.127 ln. 13)

According to Windham, Charles Alford then resisted going onto the ground but was not fighting with Windham.

Q: All right, he was resisting your attempts to put him down, correct?

A: Yes.

Q: Other than resisting your attempts to put him down, did he do any other resistance?

A: I don't recall any.

Q: All right, he didn't do any hitting, correct?

A: I don't recall any.

Q: He didn't do any kicking, correct?

A: I don't recall any.

(Windham Depo. p.128 lns. 3 through 15)

According to Windham, Charles Alford then grabbed Windham's gun, and Windham pulled the trigger while Alford was still holding onto the weapon.

Q: Did he do any grabbing of you? Did he try to grab you in any manner?

A: My weapon.

Q: All right, when you say your weapon, are you saying that the large black male attempted to grab your weapon?

A: Yes.

Q: Did he have his hand on your weapon?

A: Yes.

Q: Did he have his hand on your weapon when it was fired?

A: Yes.

(Windham Depo. p.128 ln. 16 through p.129 ln. 2)

Windham feared for his safety and fired his weapon because Charles Alford was pulling on his gun, and Lakina Alford had jumped onto his back.

> Q: Sure; you just testified that the large black male had his hand on your gun and was attempting to get your weapon. I just want to know what it is that you did when he started trying to do that?
>
> A: Well, the – the black male pulling my weapon; the – the female, or whoever, was on my back, the weight. She was the only one there that I was aware of. At that time is when I felt like the situation – I figured that I was fixing to – that eminent danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two.

(Windham Depo. p.129 ln. 19 through p.130 ln. 5)

This is Windham's own explanation for why Charles Alford was shot. There is no need for interpretation, mind-reading or second-guessing. In a light most favorable to Charles Alford, this explanation is objectively unreasonable because Lakina Alford denies jumping on Windham's back, and Charles Alford denies ever reaching for or touching Windham's weapon. The testimony of John Leggette, the officer who entered the kitchen directly behind Windham, also contradicts Windham's story. According to Leggette, he entered the kitchen within seconds behind Windham but did not see any part of Windham's

claimed altercation with Lakina Alford and Charles Alford.

> Q: When you came into the kitchen area, Officer Windham had his hand on the large black female that was on the ground?
>
> A: He was kneeling down over her. And I don't know if his hand was on her or where his other hand was at. I just remember him kneeling down on her, kneeling down right where – with her right there. And I remember coming up and I tapped him on the back and said, go ahead; I got her; I got her.
>
> Q: Okay, at this time, what was the black male doing?
>
> A: He was over kind of rocking back and forth, laying kind of face down rocking back and forth
>
> . . . . .
>
> Q: When you came in, was there anything that indicated to you that a gun had been fired?
>
> A: I could smell the – the gun powder.

(Deposition of John Leggette p.37 ln. 13 through p.38 ln. 10)

The only way Legette could have failed to see the altercation described by Windham is if it never occurred.

III. The *Graham* Decision Does Not Allow the Court to Ignore the Shooter's Explanation of the Reason for the Shooting

The only way that the Fourth Circuit can find that Windham acted reasonably is to ignore Windham's explanation of why he shot Charles Alford and create its own theory of the shooting. And this is exactly what has occurred. In place of Windham's explanation for the shooting, the Fourth Circuit has created a scenario where a hypothetical reasonable officer could have hypothetically perceived that Alford was reaching towards his gun when Alford testified that he was reaching towards a child and hypothetically could have feared for his own safety and could have hypothetically acted reasonably in shooting Charles Alford. This is the epitome of second-guessing and hindsight that *Graham* is attempting to avoid. Only this time the second-guessing and hindsight is being used to help the officer escape liability.

Respondents claim that "Petitioner's 'horror story' that *Graham* might allow an officer to escape liability based on something he never saw, thought or believed to be true does not apply in this case." (Brief in Opposition, p.26) But this is exactly what is going to happen in this case and many more cases if this Court allows the erroneous test adopted by the Fourth Circuit to go unchallenged. Windham never claimed that he shot Charles Alford because he was running towards him with arms outstretched. That is an explanation that was created by the Fourth Circuit. Windham should not be allowed to rely upon a

"theory" of the shooting that he never believed to be true. Under the test created by the Fourth Circuit, the foundation of certainty and standards built by the *Graham* decision will be shaken and destroyed. In its place, the district court will be allowed to dismiss meritorious claims by finding, in hindsight and with unrestricted second-guessing, any action taken by a claimant at any time to excuse the use of deadly force by an officer, even though the action had no bearing on the shooter's decision to use force. Where will it stop if this Court accepts the Fourth Circuit's test as a correct interpretation of the *Graham* decision?

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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